

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HAROLD G. DEMERS and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Portsmouth, N.H.

*Docket No. 96-757; Submitted on the Record;
Issued June 19, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the work-related component of appellant's severe chronic obstructive pulmonary disease (COPD) ceased when he left federal employment on September 11, 1984.

On September 22, 1993 appellant, then a 61-year-old former sandblaster, filed a notice of occupational disease, claiming that he sustained a respiratory condition due to the smoke and dust he inhaled in the performance of duty. Appellant stated that he could not pass a breathing test and had been exposed to sandblasting and lead paint dust from 1978 to 1984.

In support of his claim, appellant submitted three hospital discharge summaries the results of pulmonary function tests dated August 31, 1990, January 18 and May 21, 1991, and April 12, 1993, and a December 2, 1993 report from Dr. Gilbert C. Wager, Board-certified in internal medicine. He diagnosed moderate to severe COPD and stated that the majority of appellant's lung damage was due to his heavy smoking over many years, but that an additional level of injury, impossible to quantify, was caused by his employment.

On February 8, 1994 the Office of Workers' Compensation Programs referred appellant, together with a statement of accepted facts, the medical records and a list of specific questions, to Dr. Steven E. Weinberger, Board-certified in internal medicine, for a second opinion evaluation. Dr. Weinberger completed a duty status report on February 28, 1994, finding appellant able to work up to two hours a day but noting that he should avoid exposure to dust or fumes and extremes of heat and humidity.

In his report, Dr. Weinberger diagnosed emphysema due to smoking, based on a chest x-ray, pulmonary function tests and a physical examination. Dr. Weinberger stated that appellant's condition could have been transiently aggravated by the dust and fumes, to which he was exposed during his federal employment, but that there was no long-lasting effect and there

was no evidence he had any interstitial lung disease resulting from previous occupational exposure.

Noting that appellant's physical restrictions were severe but were not based on a work-related condition, Dr. Weinberger opined that appellant's emphysema had been aggravated since the time he left work by his continuing smoking habit, but that appellant did not currently suffer from any residuals of his work-related condition.

On March 16, 1994 the Office accepted the claim for a temporary aggravation of underlying emphysema, which ceased as of September 11, 1984 when appellant left federal employment. Appellant timely requested a hearing on the grounds that the aggravation of his condition was permanent.

Following the hearing on May 25, 1995, appellant submitted a May 30, 1995 report, from Dr. John W. Foley, an osteopathic practitioner, who had treated appellant since March 8, 1994. Dr. Foley stated that appellant's workplace caused an exacerbation of his severe COPD to the point where he could no longer work. The physician added that appellant's smoking history contributed to his respiratory disease, but his job caused the episodes of acute exacerbation requiring him to leave work.

On August 8, 1995 the hearing representative denied the claim on the grounds that the medical evidence established that the work-related aggravation of appellant's respiratory condition ceased when he left federal employment on September 11, 1984. The Office noted that, while all three physicians agreed that appellant had an underlying respiratory condition aggravated by employment, Dr. Weinberger's opinion represented the weight of the medical evidence and established that the aggravation was transient.

The Board finds that this case is not in posture for decision, because of an unresolved conflict in the medical evidence and therefore must be remanded for referral to an impartial medical examiner.

Under the Federal Employees' Compensation Act,¹ when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.² When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased,³ even if the employee is medically disqualified to continue employment, because of the effect work factors may have on the underlying condition.⁴ However, if the work-related aggravation has resulted in some permanent effect on the underlying condition, the residuals are compensable under the Act.

¹ 5 U.S.C § 8101 *et seq.* (1974).

² *Richard T. DeVito*, 39 ECAB 668, 673 (1988); *Leroy R. Rupp*, 34 ECAB 427, 430 (1982).

³ *Ann E. Kernander*, 37 ECAB 305, 310 (1986); *James L. Hearn*, 29 ECAB 278, 287 (1978).

⁴ *John Watkins*, 47 ECAB ____ (Docket No. 94-1615, issued May 17, 1996); *Marion Thornton*, 46 ECAB 899, 906 (1995).

Section 8123 of the Act⁵ provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁶ The Board has held that the medical opinions must be of relatively equal weight for a conflict to arise and in assessing the medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality.⁷

In this case, both Drs. Wager and Weinberger are Board-certified specialists. Dr. Wager, appellant's treating physician initially, stated that, while most of appellant's COPD was caused by heavy smoking, there was "an additional level of injury" that he sustained as a result of his years as a sandblaster. Dr. Wager added that appellant's occupation may have exposed him to "a fair amount of respirable silica" and possibly asbestos as well.⁸

By contrast, Dr. Weinberger believed that appellant's underlying emphysema due to smoking was only temporarily aggravated by his work as a sandblaster. Dr. Weinberger stated that appellant showed no long-lasting effects or residuals from the sandblasting work, based on the x-rays and pulmonary function tests, which revealed no interstitial or restrictive lung disease. While Dr. Wager was unable to quantify the amount of damage caused by appellant's work-related exposure, he emphasized that the possibility of permanent damage could not be ruled out. Therefore, the Board finds that Dr. Weinberger's report contradicts the conclusions of appellant's treating physician and thus constitutes a conflict requiring remand.⁹

On remand, the Office should refer appellant, the case record and the statement of accepted facts to an appropriate medical specialist for an impartial evaluation pursuant to Section 8123(a).¹⁰ After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

⁵ 5 U.S.C. § 8123(a).

⁶ *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

⁷ *Connie Johns*, 44 ECAB 560, 570 (1993).

⁸ The Board notes that Dr. Foley is not Board-certified and his opinion fails to distinguish between the effects of appellant's federal employment and his subsequent job, which apparently exposed him to other noxious fumes.

⁹ See *George S. Johnson*, 43 ECAB 712, 716 (1992) (finding that a conflict in medical opinion was not resolved, because the opinion of the referee physician was insufficiently rationalized; thus, further remand was required); *Robert P. Johnson*, 43 ECAB 260, 266 (1991) (same).

¹⁰ See 20 C.F.R. § 10.408; *Debra S. Judkins*, 41 ECAB 616, 620 (1990).

The August 8, 1995 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
June 19, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member